IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03/03/2004

CORAM

THE HONOURABLE MRS. JUSTICE R.BANUMATHI

CRL.APPEAL No.822 of 1996

Vijayaraj ... Appellant /
Complainant

-vs-

1. Githeyon Raj
2. State of Tamil Nadu,
rep. by Public Prosecutor,
Madras. ... Respondents.

Criminal Appeal against the judgment dated 16.04.1992 made in
S.T. C.No.2445 of 1991 on the file of Judicial Magistrate, Padmanabhapuram,
Kanniyakumari.

!For appellant : Mr. D.Stephen

^For respondents: Mr. V.Selvaraj, for R.1

:J U D G M E N T

This appeal is directed against the order of acquittal in
S.T.C.No.2445 of 1991 of learned Judicial Magistrate, Padmanabhapuram. By the
judgment dated 16.04.1992, 1st Respondent / Accused was convicted of the
Charge under Sec.138 Negotiable Instruments Act.

2. Gist of the Complaint. The Accused borrowed a sum of Rs.14,000/-
from the Complainant on 14.08.1991 at Thakkalai, agreeing to repay the entire
amount on 02.09.1991. When the Complainant demanded the amount on 02.09.1991,
the Accused issued Ex.A.1 - Cheque, bearing No.5 22748 of the State Bank of
India, Kalkulam Branch for Rs.14,000/-. Ex.A.1 - Cheque was presented for
collection on the same day i.e. on 02.09.1991. The Cheque was returned
unpaid for want of money with endorsement ' fund insufficient '. On
09.09.1991, the Complainant issued Ex.A.3 - Notice to the Accused. The same
was received by the Accused on 24.09.1991. But the Accused did not pay the
amount. Hence, the complaint.

3. To substantiate the averments made in the complaint, in
the Trial Court the Complainant examined himself as P.W.1. Exs.P.1 to P.5

were marked. During the questioning under Sec.313 Crl.P.C., the Accused denied his liability stating that a false case is foisted against him. The 1st Respondent / Accused examined himself as D.W.1. Defence version. The Accused admits his signature in Ex.A.1 - Cheque along with the seal of Kothanallur Town Panchayat. Case of the Accused is that he affixed the seal in Ex.A.1 - Cheque as Panchayat President, Kothanallur. His tenure as President was over on 02.03.1991. But Ex.A.1 - cheque is dated 02.09.1991. According to the Accused, the Complainant was running a Chit Transaction. One Peer Mohammed bid the chit from the Complainant. The said Peer Mohammed had not complied with the payment schedule. On the complaint by the Complainant, Peer Mohammed was taken to Police custody by Inspector of Police, Thakkalai. At that time, to get Peer Mohammed released, at the request of Peer Mohammed and his friends, Accused had talks with the Complainant Vijaya Raj. The Complainant informed him that if the Accused gives cheque security, Peer Mohammed would be released. Accordingly, the Accused issued Ex.A.1 - Cheque

on 02.09.1990 on condition not to present it for collection. On that condition, Accused issued Ex.A.1 - Cheque without date and without filling drawee's name.

4. Upon consideration of the evidence, materials and the defence version and referring to the admission of the Complainant that he filled the name "Vijaya Raj" and the date in Ex.A.1 - Cheque, the learned Magistrate acquitted the Accused on the following findings; (i) Ex.A.1 - Cheque was not issued on 02.09.1991; (ii) Since in Ex.A.1 - Cheque, seal of Kothanallur Panchayat President is affixed, presumably it must have been issued prior to 02.03 .1991, since the Office of the Panchayat President was dissolved prior to 02.03.1991; (iii)That Ex.A.1 - cheque is not supported by consideration.

Aggrieved over the order of acquittal, the Complainant / Appellant has preferred this appeal.

5. Originally, against the order of acquittal, revision was filed as Crl.R.C.No.342 of 1992, which was permitted to be treated as appeal by the order of this Court in Crl.M.P.No.3199 of 1996 in Crl.R.C.No.343 of 1992 dated 04.10.1996.

6. Assailing the findings, the learned counsel for the Appellant / Complainant submitted that when the Complainant was found to be the Holder of the Cheque, the presumption arises that he is the Holder in due course and the presumption against the Accused arises under Sec.1 39 Negotiable Instruments Act. It is further submitted that the Accused having issued the Cheque, the burden is upon the Accused to prove that the Cheque was issued only as security for the debt of Peer Mohammed and not to be encashed. Learned counsel for the Appellant / Complainant further contended that even if the defence version is accepted, the Accused cannot escape from Sec.138 of the Act, since the Cheque could be issued for discharge of any debt or liability and reliance also placed upon number of decisions in this regard.

7. Countering the arguments, learned counsel for the 1st

Respondent / Accused submitted that when the Office of the Panchayat President was dissolved on 02.03.1991, the affixure of the seal of the Panchayat probablises the defence that the Cheque was issued on 02.09.1990. When there is a definite case of the Accused that Ex.A.1 - Cheque was issued to discharge the debt of Peer Mohammed and the same was suppressed by the Complainant and when the complaint proceeds on the footing as if the Complainant had advanced the amount to the Accused, who had issued the Cheque, the Trial Court had rightly entertained the doubts regarding the issuance of Ex.A.1 - Cheque and rightly dismissed the complaint and the findings do not suffer from any erroneous approach warranting interference.

8. Whether the approach and assessment of the evidence by the Trial Court suffers from any erroneous approach warranting interference in the judgment of the acquittal ? is the only point that arises for consideration in this appeal.

9. Strict liability under Section 138 can be enforced only when the cheque is issued in discharge of any legally enforceable debt or other liability, partly or wholly. Where a cheque is issued not for the purpose of discharge of any debt or other liability, return of such cheque unpaid will not meet with the penal consequences and the maker of the cheque shall not, therefore, be liable for prosecution. Explanation to Section 138 provides that a debt or liability under this section means only a legally enforceable debt or other liability. Therefore, it becomes obligatory on the Complainant to prove that there is a legally enforceable debt or liability. Let us consider whether any evidence is adduced to show that the Accused was liable to pay any amount and whether there is any enforceable debt ?

10. The main point for consideration is whether Ex.A.1 - Cheque is shown to have been issued in discharge of any subsisting liability or debt or not. As per the averments of the complaint and Ex.A.3 - Notice, the definite case of the Complainant is that the Accused borrowed a sum of Rs.14,000/- from the Complainant on 14.08.1991, agreeing to repay the entire amount on 02.09.1991. When the Complainant demanded the amount on 02.09.1991, the Accused issued Ex.A.1 - Cheque. Nowhere in the complaint the purpose / nature of the loan advanced is stated. It is not made clear whether it was a loan transaction or chit or business transaction. No account or other materials are produced substantiating the claim. In fact, in Ex.A.1 - Cheque also the Complainant stated that the Accused had borrowed a sum of Rs.14,000/- agreeing to repay the same on 02.09.1991.

11. In his evidence, P.W.1 - the Complainant has stated that on 02.09.1991, he went to the house of the Accused and asked for money and the Accused issued Ex.A.1 - Cheque for the debt payable by him. In Ex.A.5 - Reply Notice, the Accused has clearly denied any debt payable by him to the Complainant. According to the Accused, Ex.A.1 - Cheque was issued on 02.09.1990 without filling the date and the name of the drawee. In Ex.A.5 - Reply Notice, the Accused has clearly set forth his defence. As pointed out by the Trial Court, the Complainant has conveniently omitted to produce the Reply Notice during his Chief Examination. Only in the Cross Examination when he was questioned about the Reply Notice, Ex.A.5 was produced in his

re-examination. Conduct of the Complainant in suppressing the Reply Notice and the concrete defence set up by the Accused are to be taken note of.

12. The Accused was the Panchayat President of Kothanallur Panchayat. Admittedly, Ex.A.1 - Cheque was issued as a blank cheque. The Accused had signed in the same affixing the seal as Kothanallur Panchayat President. The tenure of the Accused as Panchayat President was over on 02.03.1991. In all reasonable probablities, Ex.A.1 - Cheque must have been issued on 02.09.1990 as contended by the Accused or earlier to 02.03.1991. In the complaint filed on 24.10.1991, in the cause title the address of the Accused has been stated as " D.Gideon Raj, S/o.Dason, Christian, Nadar, aged 35, Ex.Kothanalloor Town Panchayat President ". Thus, his tenure was over on 02.03.1991. It is highly improbable that the Accused would have issued Ex.A.1 - Cheque on 02 .09.1991 with Rubber Stamp affixed. The Trial Court was right in finding that Ex.A.1 - Cheque must have been issued prior to 02.03.1991 and it would be wrong and unreasonable to interfere with that finding.

13. According to the Accused, one Peer Mohammed bid the chit from the Complainant. Since the said Peer Mohammed has not complied with the payment schedule, on the complaint of the Complainant, Peer Mohammed was taken to Police Custody. To get him released from the Police Custody, at the request of Peer Mohammed and his friends, Accused had talks with the Complainant. During the talks, as asked by the Complainant to get Peer Mohammed released, Ex.A.1 - Cheque was issued by the Accused as security. The Accused being the Panchayat President, it is quite probable that he would have acceded to the request of Peer Mohammed and his friends and issued the blank cheque on 02.09.1990 as a collateral safeguard for the amount payable by Peer Mohammed. Ex.A.1 - Cheque was issued without filling the name of the drawee and the date. Admittedly, Complainant himself had filled his name " Vijaya Raj " and the date "02.09.1991" . In that view of the matter, the learned Magistrate was right in finding that Ex.A.1 is unsupported by consideration. Learned counsel for the Complainant relied upon 199 6 Crl.L.J. 3099 in support of his contention that entire body of the cheque need not be written by maker or drawer and only the signature of drawer is material. This contention could be accepted only when the consideration is proved. In the instant case, no evidence is adduced proving the consideration. While so, it cannot be contended that only the signature of the drawer is material. Legally enforceable debt by the Accused or the liability in existence is not proved. When Ex.A.1 - Cheque is not shown to have been issued in discharge of any subsisting liability, the Accused cannot be prosecuted for dishonour of the cheque.

14. Relying upon the cases of Bhaskaran Chandrasekharan v. V. Radhakrishnan (1998 Crl.L.J.3228), Alexander v. Joseph chacko (1993 MWN 165) and Anilkumar Sawhney v. Gulshan Rai (1993 MWN 199) learned counsel for the Appellant / Complainant contended that even if the defence version is accepted, the Accused cannot escape from Sec.138 of the Act. It is the further contention that the Section deals with a cheque drawn by a person for the discharge in whole or in part of any debt or liability. This means that the debt or other liability may be due from any other person; not necessarily due from the drawer. The learned counsel for the Complainant submitted

elaborate arguments contending that the Cheque issued as a collateral safeguard to release Peer Mohammed is a 'debt' within the meaning of Sec.138 Negotiable Instruments Act and that the Accused cannot escape from Sec.138 of the Act. Finding of the Trial Court that Ex.A.1 - Cheque given in security for the release of Peer Mohammed is not a debt, is assailed as erroneous.

15. The entire argument is advanced on the premise that Ex.A.1 - cheque was issued as a security for the discharge of the debt of Peer Mohammed. When the Complainant has filed the complaint alleging that the Accused had borrowed the amount agreeing to repay the same and the cheque was issued for discharge of his own debt, the Complainant cannot turn around and contend that the Accused is to be held liable as the security for the debt of Peer Mohammed. It is not open to the Complainant to give up his own case and take advantage of the defence set forth. It is not open to the Complainant to insist upon the liability on Ex.A.1 - cheque as the security for the discharge of the amount by Peer Mohammed. Further no evidence is adduced showing the subsisting liability of Peer Mohammed and the debt payable by him. In his evidence, the Accused has stated that whenever he met the Complainant, the Complainant informed him that Peer Mohammed was paying the amount as per the payment schedule. There is no material showing the subsisting liability of Peer Mohammed. Ex.A.1 - Cheque is not shown to have been issued in discharge of any subsisting liability or debt. The Complainant himself had filled the date and name even when he was not authorised to do so.

16. Only when there are glaring infirmities and the findings suffer from serious and substantial error, the order of acquittal could be interfered with. There is no erroneous approach in assessment of evidence by the Trial Court. The reasonings and findings are well balanced in conformity with the evidence on record. In the instant case, the findings of acquittal do not suffer from any serious or substantial error warranting interference. This appeal has no merits and is bound to fail.

17. For the reasons stated above, this appeal is dismissed.

Index: Yes
Internet: Yes

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To

1. The Judicial Magistrate, Padmanabhapuram.

2. The Chief Judicial Magistrate, Nagercoil.